COMMENTS RESPONDING TO U.S. DOL's NOTICE OF PROPOSED CHANGES TO THE WD-10 SURVEY FORM

CONTROL NO. 1235-0015

North America's Building Trades Unions ("NABTU") appreciates the opportunity to comment on the U.S. Department of Labor's ("DOL") proposed revisions to the WD-10 form used by the agency to solicit wage data for purposes of determining the prevailing wage under the Davis-Bacon Act of 1931 and Related Acts (collectively, "DBA"). 87 Fed. Reg. 36,152 (June 15, 2022).

NABTU is a labor organization composed of fourteen affiliated national and international unions, with 291 state and local building and construction trades councils throughout the United States, which together represent more than three million men and women. NABTU and its affiliates understand that the DBA's proper implementation is critical to construction workers and their families. By upholding wages for construction workers on federal and federally assisted projects, the DBA preserves area labor standards for the benefit of *all* workers in the construction industry. NABTU, therefore, commends DOL's efforts to improve the implementation of the DBA, including its efforts to streamline the form used to set the wage floor on DBA-covered projects.

NABTU's comments will focus on ways in which DOL can improve the WD-10 form, its instructions, and the Classification and Sub-Classification Directory ("Directory").

BACKGROUND

The Davis-Bacon Act is a 91-year-old minimum wage law that protects the wages and benefits of construction workers by prohibiting contractors and subcontractors on federal construction projects from paying less than the local prevailing wage. Prevailing wages are wage and fringe benefit rates that DOL's Wage and Hour Division ("WHD") establishes by locality, for each classification of construction worker, based on data it collects from construction projects in

the area. 29 C.F.R. Pt. 1. Since the enactment of the Davis-Bacon Act, Congress has passed over 90 laws extending prevailing wage requirements to projects that receive various forms of federal assistance, including grants, loans, guarantees, insurance, tax credit bonds, and other innovative financing methods. These laws are known as Related Acts.

To determine the prevailing wage under the Davis-Bacon Act of 1931 and Related Acts, WHD conducts annual wage surveys. The DBA's implementing regulations provide that DOL shall encourage contractors, contractors' associations, labor unions, public officials, and other interested parties to participate in the wage surveys. 29 C.F.R. §1.3(a). WHD uses the WD-10 form to solicit wage data from contractors and interested parties. Local unions in the construction industry use the WD-10 form to report wage data from local projects on which their members worked.

NABTU's POSITION

1. Additional Changes to the WD-10 Form and its Instructions will Further DOL's Goal of Streamlining the Collection of Wage Data and Encouraging Survey Participation.

NABTU commends DOL's proposed changes to the WD-10 form that seek to eliminate requests for information that are overly burdensome and unnecessary for determining the prevailing wage. For example, the form currently asks respondents to identify each project's "peak week" – the week in which the largest number of workers performed work on a project. The question deters survey participation by all interested parties because it is extremely difficult and burdensome for respondents to identify the peak week on projects carried out the previous year. By restricting wage data submissions to one single peak week, the current form unduly limits the amount of data that respondents submit per project, which is contrary to the agency's data collection goal. More importantly, DOL's regulations do not contemplate any such limitation. To

the contrary, the regulations suggest that DOL should capture the *total* number of workers employed in each classification on each project. 29 C.F.R. §1.3(b)(1).

NABTU also agrees with DOL's proposal to remove the question on whether the project reported on the WD-10 is subject to any state prevailing wage law. Because there are no statutory or regulatory restrictions on the utilization of data from state prevailing wage projects, the question is unnecessary. Currently, the only restriction pertains to data from projects subject to the DBA. Specifically, the regulations provide that, with respect to building and residential construction surveys, DOL may only use data from Davis-Bacon projects when it receives insufficient wage data from private projects. 29 C.F.R. § 1.3(d). There is no similar prohibition on the use of data from projects that are covered by state prevailing wage laws. The question on state prevailing wage projects is therefore unnecessary and deters interested parties from submitting wage data where the answer to the question is not readily available.

DOL also seeks to clarify that several questions in the WD-10 form are not mandatory. Such clarifications are critical because there is a misconception among respondents that DOL will not consider submissions unless every single question in the WD-10 form is answered. As a result, many stakeholders choose not to participate in the surveys at all, viewing the effort as a fruitless exercise. NABTU recommends that DOL make the following additional change to further clarify that non-essential questions need not be answered:

- On page 1 of the revised form, in the field that requests the name of the Prime Contractor on the project, add the following clause ", if known". This will signal to the submitter that their form will be accepted even without this piece of information. Although the form's accompanying instructions state that the name of the Prime Contractor is optional, DOL

should make that point clear on the face of the form just as it is proposing to do with regard to the questions on project value.

With respect to the WD-10 form's instructions, NABTU has a number of recommendations designed to help improve clarity and consistency.

Section titled, "Project Type(s)":

- The definitions for Residential and Highway construction, include the terms "construction, alteration, or repair," which are consistent with the statutory text of the DBA and its implementing regulations. 40 U.S.C. §3142(a); 29 C.F.R. §5.5(a). To avoid confusion, the definitions for Building and Heavy construction should include the same terms. For example, under the Building definition, the phrase "Involves the construction of a sheltered enclosure" should be replaced with "Involves the construction, alteration, or repair of a sheltered enclosure".
- To avoid confusion, the definition for Building construction should state that residential buildings that are five stories in height or greater qualify as Building construction.
- The definition for Highway construction suggests that when participating in a highway construction survey, respondents should exclude highway projects that are "incidental" to building or heavy construction. DOL should remove this instruction because respondents should not bear the burden of making such a determination. Most respondents will not know or understand the standard to apply in making such a determination, and many do not understand what type of projects qualify as "Heavy." Such a decision is best left to the expertise of the agency's wage analysts.

- The definition for Heavy construction should include a few examples of what type of project qualifies as Heavy – i.e., dredging projects, outdoor electrification projects, pipelines. The definition should also include a hyperlink to All Agency Memo. (AAM) 130 (Mar. 17, 1978), which includes a detailed list of projects that DOL has placed under the Heavy construction category.
- The instructions relating to AAM 236 should be struck because AAM 236 provides guidance to contracting officers on when to use multiple wage determinations on a DBA-covered project. Such guidance is not applicable to the survey process, and even if it did apply, such a determination is best left to the expertise of the agency.

Sections titled, "Labor Classification Number" and "Labor Classification Name":

- As discussed in greater detail below, DOL should strike the "Other Classifications" category because no other key classifications exist apart from those already listed in the proposed Directory. The "Other Classification" category will only encourage unscrupulous contractors to subdivide key classifications for the purpose of paying workers less.

Section titled, "Sub-Classification Number":

- The instructions suggest that respondents should select the "other sub-classification" option where the sub-classifications listed in the proposed Directory do not reflect the work performed on a project. The Directory, however, does not include that option. DOL should revise the Directory to expressly include the "other sub-classification" option.
- The instruction on DOL's long-standing policy on working supervisors/forepersons is vulnerable to misinterpretation. The instruction provides that a foreperson should only be

reported in a survey if they devote at least 20 percent of their workweek to performing the work "of a classification in the 'Classification and Sub-classification Directory'". This statement is confusing because if a respondent is reporting work that falls under the "other" category, such work will not appear in the Directory. NABTU suggests replacing the supervisor/foreperson instruction in this section, and wherever else it appears in the instructions, with the following: "Working supervisors/forepersons should only be reported if they spend at least 20 percent of their workweek performing duties that are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial." Such language is consistent with the regulatory definition for "laborer" and "mechanic." 29 C.F.R. §5.2(m).

New Section titled, "Additional Remarks":

- In the form's instructions, DOL should add examples of clarifying information that respondents may wish to include in the "Additional Remarks" section of the form. DOL should consider including the following instruction: "Respondents may include clarifying comments in this section. For example, where wage rates vary among workers in the same classification due to wage escalators or wage increases in the workers' collective bargaining agreement, respondents should explain that here. Or where a respondent submits wage data for work that was not performed within the survey time frame, but the underlying project was active during the survey time frame, the respondent should explain that here."

2. Changes to the Proposed Classifications and Sub-Classifications Directory Are Needed to Prevent the De-Skilling of Traditional Classifications and Improve the Accuracy of Reporting.

As discussed above, DOL should strike the "Other Classification" option from its proposed Directory because it will only encourage unscrupulous contractors to subdivide traditional classifications and invent "new" low wage classifications. As the Wage Appeals Board explained in *Fry Brothers*, "under the DBA it is not permissible to divide the work of a classification into several parts according to the contractor's assessment of each worker's skill and to pay for such division of the work at less than the specified rate for the classification." WAB No. 76-06 (June 14, 1977). The Board warned that if a contractor is permitted to "classify or reclassify, grade or subgrade traditional craft work as he wishes . . . [t]here will be little left to the Davis-Bacon Act." *Id*. Not long after *Fry Brothers*, the D.C. Circuit Court of Appeals similarly recognized that one of the DBA's principal objectives is to address the practice of "under classification" where contractors whittle away at prevailing wages by reclassifying craft work as they please to avoid paying employees higher wages. *Building Trades v. Donovan*, 712 F.2d 611, 625 (D.C. Cir. 1983).

The preservation of traditional key classifications in the construction industry – e.g., bricklayers, electricians, ironworkers, pipefitters – is important for a number of reasons. First, due to their extensive training, multiskilled workers in key classifications command strong family-sustaining wage rates and benefits.[1] Research also shows that multiskilled workers in key classifications have greater job satisfaction and easier career development as a result of their training.[2] Second, it is important to preserve and promote well-established key classifications

[1] Robert W. Glover, *Construction Industry Craft Training in the United States and Canada*, Construction Industry Institute, at 23 (2007).

[2] *Id*. at 23-24.

because failing to do so will discourage young workers from seeking out apprenticeship opportunities. Accordingly, DOL should adopt policies and procedures that prevent and discourage contractors from splicing up traditional craft classifications.

The Directory must also include those well-established subclassifications that most frequently appear in communities across the country. For example, under the Laborer classification (no. 1600), major subclassifications of that trade are not currently listed in the proposed Directory. To facilitate the proper reporting of the various Laborer subclassifications, the "other sub-classification" option must be expressly included in the 1600 series. Similarly, under the Bricklayer classification (no. 401), well-established subclassifications – such as Stone Mason and Pointer, Caulker, Cleaner – are missing. The comments of the International Union of Bricklayers and Allied Craftworkers explains the changes that should be made to the Directory in order to capture the breadth of occupations in the masonry/trowel trades.

With respect to the electrical trade, the Directory erroneously lists "Low Voltage Wiring System Worker" (no. 2801) as a standalone "Classification" when, in fact, that occupation is a subclassification of the Electrician classification (no. 801). Moreover, as the International Brotherhood of Electrical Workers explains in its comments, the term "low voltage" should be abandoned because it is ambiguous; it has no fixed meaning. DOL should instead adopt the more specific term, "Sound and Communications" worker, and include it as a subclassification to the Electrician classification (no. 801).

With respect to the Power Equipment Operator classification (no. 4000), several subclassifications – such as Crane (no. 4016) and Bulldozer (no. 4011) – should be modified to reflect variations in equipment size. For example, in most communities, wage rates paid to Crane Operators will vary based on boom length, bucket size and/or tonnage. The same is true for other

equipment, such as excavators and bulldozers. As the International Union of Operating Engineers explains in its comments, excavators can be small enough to carry out landscaping in a home's backyard garden and large enough to dig the foundation of the World Trade Center. DOL's Directory should therefore reflect those substantial distinctions in power equipment.

CONCLUSION

NABTU appreciates DOL's continued efforts to improve the overall quality and accuracy of DBA prevailing wage rates. Such measures are critical to ensuring that construction workers are properly compensated for their work. DOL's proposed changes to its survey collection form coupled with NABTU's recommendations – especially with regard to the Classifications and Sub-Classifications Directory – will promote more accurate reporting and ensure an increased level of participation from contractors and interested parties.